



March 19, 2001

Mr. James M. Kuboviak
Brazos County Attorney
Brazos County
300 East 26th, Suite 325
Bryan, Texas 77803

OR2001-1055

Dear Mr. Kuboviak:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145163.

The Brazos County Constable (the "constable") received a request for the employment application, promotions, awards, training, reprimands, complaints, disciplinary actions, qualifications, educational background and other information relating to a specified officer. You claim that the requested information is excepted from disclosure under sections 552.026, 552.101, 552.102, 552.103, 552.108, 552.114, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a) provides as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) applies. The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). Further, section 552.103 only applies where the litigation involves or is expected to involve the governmental body which is claiming the exception. *See* Open Records Decision No. 392 (1983)(finding predecessor to section 552.103 only applicable to governmental body who has the litigation interest). You state that the requested information relates to criminal litigation that is currently pending to which the State of Texas is a party. However, the

constable is not a party to the criminal case and, therefore, has no section 552.103 interest in the requested information. In addition, you do not demonstrate that the prosecutor has expressed a section 552.103 interest in the information. *See, e.g.*, Open Records Decision No. 469 (1987). Consequently, the information is not excepted by section 552.103 in this instance.

You assert that the submitted medical records are excepted under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by statute. The medical records consist of declarations of medical condition and psychological and mental health required by the Texas Commission on Law Enforcement Officer Standards and Education which are confidential pursuant to Section 1701.306 of the Occupations Code. Section 1701.306 of the Occupations Code provides as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

Therefore, you must withhold the marked information under section 552.101 in conjunction with section 1701.306 of the Occupations Code.¹

¹Because you must withhold these documents under section 552.101 in conjunction with section 1701.306 of the Occupations Code, we need not address section 552.102 with regard to these documents.

You also assert that the submitted transcript is excepted under section 552.101 in conjunction with the Family Educational Rights and Privacy Act of 1974 ("FERPA") and sections 552.026 and 552.114 of the Government Code. See 20 U.S.C. § 1232g(b)(1). FERPA restricts the disclosure of personally identifiable information contained in a student's education records. "Education records" are defined as records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). Section 552.026 provides that the Public Information Act does not require the release of information contained in education records except in conformity with FERPA. Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Because the constable is not an educational agency or institution or a person acting for such agency or institution, the submitted transcript is not an "education record" to which FERPA applies. See 20 U.S.C. § 1232(g)(a)(3) (defining educational agency or institution under FERPA). Consequently, the transcript is not excepted under section 552.101 in conjunction with FERPA or sections 552.026 and 552.114 of the Government Code.

You also assert that the transcript is excepted under section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the act. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, we will address whether section 552.101 in conjunction with common law privacy applies to the transcript.

Common law privacy excepts from disclosure private facts about an individual. *Id.* Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). This office has held that the public has a legitimate interest in the job qualifications of public employees, including college transcripts. See Open Records Decision Nos. 470 (1987); 467 (1987). Accordingly, you may not withhold the submitted transcript under section 552.101 in conjunction with common law privacy.

Next, you assert that the submitted information contains documents that are excepted under section 552.108(b)(1) of the Government Code. Section 552.108(b)(1) provides as follows:

- (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(b)(1). This office has stated that certain procedural information may be withheld under section 552.108 of the Government Code, or its statutory predecessors. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (forms indicating location of off-duty police officers), 413 (1984) (security measures to be used at next execution), 143 (1976) (specific operations or specialized equipment directly related to investigation or detection of crime). To claim this aspect of section 552.108 protection, however, a governmental body must meet its burden of explaining, if the requested information does not supply the explanation on its face, how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under section 552.108), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known with law enforcement and crime prevention).

You state that release of the firearms proficiency record, which lists each weapon the officer is qualified to use, could place the officer in a potentially life-threatening disadvantage in confrontations with suspects. Based on your representation, we conclude that the constable may withhold the highlighted portions of this document under section 552.108(b)(1) of the Government Code. With regard to the letter of thanks from the county officer, we do not believe that you have demonstrated that release of this document would interfere with law enforcement. Accordingly, you may not withhold this letter of thanks under section 552.108(b)(1) of the Government Code.

You also assert that the letter of thanks is excepted under section 552.111 of the Government Code. Section 552.111 excepts from required public disclosure interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ); Open Records Decision No. 615 at 5 (1993). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.) (emphasis added). After reviewing the letter of thanks, we conclude that it does not relate to policymaking nor does it contain any advice, opinion, or recommendation. Therefore, it is not excepted under section 552.111 of the Government Code.

You also assert that portions of the submitted information are excepted under section 552.117(2) of the Government Code. Section 552.117(2) of the Government Code excepts from public disclosure a peace officer's home address, home telephone number,

social security number, and information indicating whether the peace officer has family members regardless of whether the peace officer made an election under section 552.024 of the Government Code. Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We have marked the information that you must withhold under section 552.117(2) of the Government Code.

Further, you assert that the driver's license number of the peace officer should be excepted under section 552.130 of the Government Code. Section 552.130(a) of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. Therefore, you must withhold the marked driver's license number under section 552.130(a) of the Government Code.

In conclusion, you must withhold the declarations under section 552.101 in conjunction with section 1701.306 of the Occupations Code. You must also withhold the marked information under section 552.117(2) and section 552.130. Further, you may withhold the highlighted portions of the firearms proficiency record under section 552.108(b)(1). You must release the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer H. Bialek
Assistant Attorney General
Open Records Division

JHB/er

Ref: ID# 145163

Encl: Submitted documents

cc: Mr. Kyle Hawthorne
Bruchez, Goss, Thornton, Meronoff & Hawthorne, P.C.
4343 Carter Creek Parkway, Suite 100
Bryan, Texas 77802
(w/o enclosures)